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ASSESSING THE PUBLIC ADMINISTRATION'S INTENTION IN EU ECONOMIC LAW: CHASING GHOSTS OR DRESSING WINDOWS?

Dr Albert Sanchez Graells*

ABSTRACT

This paper reflects about the role of subjective or intentional elements in EU economic law prohibitions, particularly in relation to rules addressed to the public administration. From a normative perspective, it stresses how, on the whole, it is desirable to suppress the need for an assessment of subjective intent and to proceed with an *objectified* enforcement of such prohibitions. In order to do so, and from a positive perspective, the paper looks at public procurement and State aid rules as two examples of areas of EU economic law subjected to interpretative and enforcement difficulties due to the introduction, sometimes veiled, of subjective elements in their main prohibitions. The paper establishes parallels with other areas of EU economic law—such as antitrust, non-discrimination law and the common agricultural policy—and seeks benchmarks to support the main thesis that such intentional elements need to be ‘objectified’, so that EU economic law can be enforced against the public administration to an adequate standard of legal certainty. This mirrors the development of the doctrine of abuse of EU law, where a similar ‘objectification’ in the assessment of subjective elements has taken place.

The paper draws on the case law of the Court of Justice of the European Union to support such ‘objectification’ of intentional elements in EU economic law, and highlights how the Court has been engaging in such interpretative strategy for quite a long time. It then goes on to explore the interplay between such an approach and more general protections against behaviour of the public administration in breach of EU law: ie the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union, and the doctrine of State liability for infringement of EU law. The paper concludes with the normative recommendation that the main prohibitions of EU economic law should be free from subjective elements focused on the intention of the public administration.

KEYWORDS

EU economic law, intention, subjective element, interpretation, objectification, legal certainty, good administration.

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I. INTRODUCTION

The State and its emanations need to comply with EU economic law.¹ Undertakings developing economic activities in the internal market are also subjected to EU economic law. Despite the growing scope for private enforcement of EU economic law, on the whole, the entities entrusted with monitoring and enforcing those rules are also of a public nature, ie either public bodies or emanations of the State. Consequently, even if individuals are ultimately involved in each of those acts, EU economic law is primarily addressed to, complied with or infringed, monitored by and enforced against public and corporate entities, or legal persons of a collective nature.² In this setting, given the difficulties, if not impossibility, in determining whose individual intention is determinative of the institutional or corporate behaviour under assessment, a construction of EU economic law around objective prohibitions contributes to legal certainty and effectiveness of enforcement.³ Conversely, the introduction of intentional or subjective elements—that is, aspects of a prohibition that focus on the actual or presumed intentionality behind the infringement—poses complex questions of assessment of such intent in relation to the public administration and corporate entities.

Furthermore, it is also unclear whether these elements aim to be used to stress the traditional punitive (criminal) law principle of *mens rea*—with the necessary adaptation to corporate liability⁴—or if they are rather used as threshold-concepts or flexibility clauses within EU economic law prohibitions, thus aimed at modulating evidentiary requirements and to create scope for proportionality assessments whereby the subjective requirement is mainly aimed at the creation of some leeway within the prohibition,⁵ but not so much oriented at the establishment of a requirement to assess the *actual* ‘corporate’ state of mind. The latter use of subjective elements would equate to the creation of a dual route to a *de minimis* exception to prevent the enforcement of EU economic law against the public administration and corporate entities by allowing them to avoid liability for substantive (ie not *de minimis*) infringements on the basis of their subjective position—which would be difficult to reconcile with either the explicit existence of *de minimis* exceptions for specific types of behaviour (of private entities),⁶ or the margin of tolerance already created in terms of public (State) liability, which only arises in instances of a *sufficiently serious breach* of EU law (by the public administration).⁷ In other words, using subjective elements as proportionality devices would allow addresses of EU economic law prohibitions two bites of the cherry, as they could defend their behaviour both on the grounds that it did not generate sufficiently serious or appreciable (detrimental) effects, or that it was not intended (or both). These difficulties derived from the inclusion of subjective clauses in EU economic law provisions

¹ For discussion of broader implications, see K A Armstrong, ‘The Character of EU Law and Governance: From “Community Method” to New Modes of Governance’ (2011) 64 (1) *Current Legal Problems* 179.

² See: J Tallberg, ‘Paths to Compliance: Enforcement, Management, and the European Union’ (2002) 56 (3) *International Organization* 609.

³ For discussion, see R de la Feria, ‘Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax’ (2008) 45 (2) *Common Market Law Review* 395.

⁴ For extended discussion, see D Brodowski et al (eds), *Regulating Corporate Criminal Liability* (Springer, 2014). In the UK, the identification principle is used to impute to the company ‘the acts and state of mind’ of those who represent the directing mind, see Crown Prosecution Service, *Legal Guidance on Corporate Prosecutions*, available at http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a07, accessed 11 April 2016.

⁵ For a similar discussion in the area of US antitrust law, see R Cass and K Hylton, ‘Antitrust Intent’ (2001) Regulatory Policy Program Working Paper RPP-2001-12, available at <http://www.hks.harvard.edu/m-rcbg/research/rpp/RPP-2001-12.pdf>, accessed 11 April 2016.

⁶ See below (n 75) and accompanying text.

⁷ For discussion, see K Schiemann, ‘The State’s Liability in Damages for Administrative Action’ (2011) 33(5) *Fordham International Law Journal* 1548-1563. See also further discussion below §V.B.

can seriously threaten legal certainty and diminish their effectiveness and thus deserve some careful consideration.

As has been rightly pointed out, ‘*important decisions within the spheres of economic and social law are taken by governments, companies or other collective or non-natural decision-makers. To speak of the “intent” of such bodies is to run the risk of anthropomorphism*’; and, consequently, ‘*it is more common to understand economic and social EU law in terms of effects*’.⁸ In the end, ‘[d]eterminations of collective intention are always constructions ... the very notion of collective intention requires some degree of extrapolation from the facts’.⁹ Therefore, the inclusion of subjective elements in EU economic law prohibitions necessarily requires a circumstantial analysis and an effects-based approach to the assessment of the behaviour of any collective entity,¹⁰ and in particular the public administration.¹¹ In other words, subjective or intentional elements need to be ‘objectified’, so that EU economic law can be enforced to an adequate standard of legal certainty. This is the point of departure of this paper, which reflects about the role of subjective or intentional elements in EU economic law prohibitions, particularly in relation to rules addressed to the public administration. From a normative perspective, it stresses how, on the whole, it is desirable to suppress the need for an assessment of subjective intent and to proceed with an *objectified* enforcement of such prohibitions. In order to do so, and from a positive perspective, the paper explores the existing case law of the Court of Justice of the European Union (CJEU) in several areas of EU economic law to assess to what extent it is possible to rely on an ‘objectified’ analysis of intentional elements in their core prohibitions and, in particular, to rely on an objective assessment of the effects and the circumstances surrounding breaches of EU economic law by the public administration.

It is submitted that this discussion is interesting for a number of reasons. Other than the implications for the design of EU economic law in a manner that increases its enforceability, the analysis of the treatment of subjective intent of the public administration by the CJEU may reveal interesting trends. The CJEU has not given a general ruling on the meaning of intent applicable for the whole of EU law and its approach has been piecemeal, dependent on the specific area of EU law where the interpretation of subjective elements was required. It has been stressed that ‘*taking the criminal law perspective as a starting point could lead to decisions that are not in accordance with the goals of both administrative and tax laws*’,¹² thus justifying a different approach depending on the specific area of law under consideration. This comes to support the thesis advanced in this paper as far as an ‘objectified’ assessment of intent in EU economic law applicable to the public administration deviates from the *canon* of interpretation of intent under criminal law. It is submitted that assessing the behaviour of the public administration diverges from the assessment of private corporate entities due to, at least,

⁸ G Davies, ‘Discrimination and beyond in European Economic and Social Law’ (2011) 18 *Maastricht Journal of European & Comparative Law* 7, 13-14. For a very clear criticism based on the situation in the United States, see TR Tyler and A Mentovich, ‘Punishing Collective Entities’ (2010) 19 (1) *Journal of Law and Policy* 203.

⁹ A Ristoph, ‘State Intentions and the Law of Punishment’ (2008) 98 (4) *Journal of Criminal Law and Criminology* 1353, 1366.

¹⁰ As mentioned (n 4), this discussion is somehow related to the issue of imputation of criminal liability to corporate entities or, more closely, the imputability of infringements of competition law (as further discussed below, §IV). On the imputation of criminal liability to corporate entities, see eg A Foerschler, ‘Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct’ (1990) 78 (5) *California Law Review* 1287-311; and CMV Clarkson, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) 59 (4) *Modern Law Review* 557-72.

¹¹ However, many of the considerations are equally, or at least largely applicable to an assessment of corporate behaviour for the purposes of applying EU economic law prohibitions to undertakings.

¹² JM ten Voorde, ‘The Concept of Intent in Rulings of the Court of Justice of the European Union’ (2015) 21 (3) *European Public Law* 555, 564.

two influential elements. First, the duty for the public administration to act in strict compliance with the law as part of the right/duty of good administration recognised in Article 41 of the Charter of Fundamental Rights of the European Union (Charter)¹³ and its implications in terms of legal compliance by public authorities, particularly in cases where EU law allows them to exercise discretion (see further discussion below §V). Second, due to the existence of varying forms of a presumption of legality of the acts of the public administration in the legal order of several Member States.¹⁴

It is further submitted that assessing the behaviour of the public administration also deviates from any analysis of legislative or Parliamentary intention, at least in one basic functional aspect. The analysis of Parliamentary intention in some EU domestic systems (such as the UK)¹⁵ is aimed at clarifying the scope of the rules that the courts must apply¹⁶—or, in some settings, to determine whether specific legal situations fall within the scope of Parliamentary discretion in terms of the State’s margin of appreciation of complex issues.¹⁷ Parliamentary intention is, ultimately, a requirement linked to its supremacy and a legal device to reign in judicial activism.¹⁸ The assessment of the intention of the public administration does not serve the same purpose. The public administration is not meant to operate on the basis of subjective assessments, but rather of objective policy directions. Where it has discretion, the public administration must exercise it in an objective manner or, in other words, it has the duty to act in accordance with the general principle of objectivity.¹⁹

In any case, even if these distinctions between the assessment of the behaviour of the public administration from, on the one hand, that of legislative branches of the State and, on the other hand, private entities were not persuasive, it is also clear that intent has not featured in a prominent manner in the case law of the CJEU applicable to wither. Indeed, the CJEU has been reluctant to engage in subjective assessments and has pushed for their objectification in litigation that concerned disputes between the EU Institutions and Member States,²⁰ or which required an assessment of the purpose of certain interventions by Member States that could have triggered issues concerning their intention, *lato*

¹³ Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

¹⁴ For discussion, see R Caranta, ‘Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection’ in R Caranta and A Gerbrandy (eds), *Traditions and Change in European Administrative Law* (Europa Law Publishing, 2011) 15.

¹⁵ For a broader perspective, see K Hayne AC, ‘Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?’ (2013) 13(2) *Oxford University Commonwealth Law Journal* 271-282.

¹⁶ For discussion, see SC Styles, ‘The Rule of Parliament: Statutory Interpretation after *Pepper v Hart*’ (1994) 14(1) *Oxford Journal of Legal Studies* 151-158.

¹⁷ For related discussion, see A Kavanagh, ‘Proportionality and Parliamentary Debate: Exploring Some Forbidden Territory’ (2014) *Oxford Journal of Legal Studies* 1-37; and *ibid*, ‘The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998’ (2006) 26(1) *Oxford Journal of Legal Studies* 179-206.

¹⁸ For discussion, see J McGarry, ‘Intention, Supremacy and Judicial Review’ (2013) 2(1) *The Theory and Practice of Legislation* 255-276; and B Dickson, ‘Activism and Restraint within the UK Supreme Court’ (2015) 21(1) *European Journal of Current Legal Issues*, available at <http://webjcli.org/article/view/399/515>, accessed 11 April 2016.

¹⁹ European Commission, *Code of Good Administrative Behaviour*, available at http://ec.europa.eu/transparency/code/docs/code_en.pdf. See also European Ombudsman, *The European Code of Good Administrative Behaviour*, available at <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>, both accessed 11 April 2016.

²⁰ For instance, where issues of EU competence and its possible abuse were discussed, such as in the famous *Tobacco advertising case*. See *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, paras 32-34. For discussion, stressing that “the Court chose not to place any reliance on the subjective views of the political institutions in drafting and ultimately adopting the measure”, see S Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide”’ (2011) 12 (3) *German Law Journal* 827-864.

sensu.²¹ In these cases, the CJEU has avoided engaging in any subjective assessment and has resorted to an objective appraisal of the circumstances surrounding the behaviour giving rise to the dispute. In litigation between undertakings, the CJEU has also retreated from the need to assess subjective elements in many important areas, such as trade mark law.²² Therefore, the general approach has indeed been to understand economic and social EU law in terms of effects. It is submitted that this general approach by the CJEU has been fundamentally oriented towards ensuring the effectiveness of EU law through a narrow interpretation of prohibition clauses and general arguments based on subjective intention that could erode it, which may have resulted in more consistency than one could expect from the CJEU.²³

On that note focused on the *effet utile* of EU economic law, it is worth stressing that the establishment and assessment of subjective elements has been particularly controversial in the shaping of the *doctrine of abuse of EU law*,²⁴ where the CJEU has progressively abandoned strict analyses of direct ‘intention’ and moved towards ‘objectified’, contextual assessments of the behaviour of undertakings and corporate entities²⁵—ie, towards the use of presumptions and objective criteria to assess the potentially abusive intention of legal persons.²⁶ This interpretive strategy contributes to promote legal certainty and effectiveness in the enforcement of EU economic law. However, it also raises the broader issue of the relevance and role of such subjective elements, as well as the practical viability of their continued inclusion in EU economic law prohibitions. Given that the CJEU objectifies the assessment of such intentional elements in cases of alleged abuse of EU law, can such ‘objectification’ of the prohibition also be carried on to the analysis of ‘regular’ infringement allegations where no such abusive element is present? Is the introduction of the subjective element superfluous and it should simply be disregarded; or is it aimed at playing a moderating or attenuating role in the enforcement of the core prohibitions where such ‘objectified’ assessment of intention is required? What are the practical implications of the tension between, on the one hand, the inclusion of subjective elements by the EU legislator in EU economic law prohibitions and, on the other hand, their objectification by the CJEU in their interpretation and application?

²¹ Remarkably, the dispute in *Henn and Darby*, C-34/79, EU:C:1979:295, where the CJEU used the expression ‘disguised restriction of trade’, but avoided a direct assessment of the intention of the United Kingdom. See PJ Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th ed (Hart, 2010) 8.20.

²² See, generally, the discussion following *Centrafarm*, C-3/78, EU:C:1978:174, which was criticised for the apparent creation of a subjective test later abandoned; P Torremans, *Holyoak and Torremans Intellectual Property Law*, 7th ed (Oxford University Press, 2013) 527. See also C Baden-Fuller, ‘Economic Issues Relating to Property Rights in Trademarks: Export Bans, Differential Pricing, Restrictions on Resale and Repackaging’ (1981) 6 (3) *European Law Review* 162-179.

²³ For a critical view, see H de Waele, ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’ (2010) 6(1) *Hanse Law Review* 3-26.

²⁴ For extended discussion, see A Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart, 2014) and the contributions to R de la Feria and S Vogenauer, *Prohibition of Abuse of Law—A New General Principle of EU Law?* (Hart, 2011).

²⁵ See A Bobić, *Prohibition of Abuse of Rights in the EU* (2011) LLM Thesis, University of Zagreb, available at https://www.pravo.unizg.hr/download/repository/Bobic_thesis_final.pdf, accessed 5 August 2015.

²⁶ Ibid, 14 and ff. See also A Lenaerts, ‘The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law’ (2010) 18 (6) *European Review of Private Law* 1121; and K E Sørensen, ‘Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?’ (2006) 43 (2) *Common Market Law Review* 423. This interpretive strategy was proposed by Advocate General Lenz in *TV10 v Commissariaat voor de Media*, C-23/93, EU:C:1994:251, paras 61 and 65-66. It has been applied in particularly clear terms by the CJEU in *Halifax and Others*, C-255/02, EU:C:2006:121, para 75. Recently, see *Slancheva sila*, C-434/12, EU:C:2013:546, paras 39 and 41. See also *Commission v Hungary*, C-115/13, EU:C:2014:253, para 33. Interestingly, the same type of assessment has been applied to disputes between Member States where arguments regarding potential abuses of EU law were raised; see *Hungary v Slovakia*, C-364/10, EU:C:2012:630, paras 56-62.

These issues are particularly relevant when it comes to the enforcement of EU economic law against the State and its emanations because the assessment of intent of such entities is even more complex than in relation to undertakings or corporate agents for the reasons set out above. This triggers the need to explore in detail how to assess subjective elements in core prohibitions of EU economic law applicable to the public sector, or which require direct intervention by a public administration.²⁷ In line with previous considerations and the development of the doctrine of abuse of EU law by private legal entities, it is submitted that a plausible thesis is that such assessment also needs to be ‘objectified’ and that the intention of the State and its emanations needs to be assessed by a mix of presumptions and recourse to objective criteria that allow for a contextual analysis of the behaviour deemed to breach EU law.

Building on this normative position, this paper looks at public procurement and State aid rules as two examples of areas of EU economic law subjected to interpretative and enforcement difficulties due to the introduction, sometimes veiled, of subjective elements in their main prohibitions (§II and §III). The paper then establishes parallels with other areas of EU economic law, such as antitrust, non-discrimination law or the rules governing the imposition of financial sanctions for infringements of the common agricultural policy, and seeks benchmarks to support the main thesis that such intentional elements need to be ‘objectified’, so that EU economic law can be enforced against the public administration to an adequate standard of legal certainty (§IV). The paper draws on the case law of the CJEU to support such ‘objectification’ of intentional elements in EU economic law, and highlights how the Court has been engaging in such an interpretative strategy for quite a long time. It then goes on to explore the interplay between such an approach and more general protections against behaviour of a public administration in breach of EU law: ie the right to good administration in Article 41 Charter, and the doctrine of State liability for infringement of EU law (§V). The paper concludes with the normative recommendation that the main prohibitions of EU economic law should be free from subjective elements focused on the intention of the public administration. (§VI).

II. ASSESSMENT OF INTENT UNDER EU PUBLIC PROCUREMENT RULES

Public procurement is an area where EU law has developed an increasingly prescriptive regulatory framework that imposes significant restrictions on Member States’ discretion to organise their activities as public purchasers.²⁸ The CJEU has unambiguously declared that procurement ‘*legislation contains fundamental rules of EU law ... intended to ensure the application of the principles of equal treatment of tenderers and of transparency in order to open up undistorted competition in all the Member States*’,²⁹ and repeatedly stressed that the purpose of the procurement directives ‘*is to develop effective competition in the field of public contracts*’.³⁰ This has led to a significant body of case law that sketches the obligations that Member States have to comply with in the process leading to the award of a public

²⁷ Cf I Baciú, ‘The “Abuse of Rights” in Light of the CJEU Case Law: A Radiography of Decision C-434/12’ (2014) 9 (2) *European Procurement & Public Private Partnership Law Review* 138.

²⁸ See S Arrowsmith, ‘The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?’ (2005–2006) 35 *Public Contract Law Journal* 337; *ibid*, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2011–2012) 14 *Cambridge Yearbook of European Legal Studies* 1.

²⁹ *Impresa Pizzarotti*, C-213/13 EU:C:2014:2067, para 63, with reference to *Commission v Portugal*, C-70/06, EU:C:2008:3, para 40; *Mikhaniki*, C-213/07, EU:C:2008:731, para 55; *Commission v Cyprus*, C-251/09, EU:C:2011:84, paras 37 to 39; and *Manova*, C-336/12, EU:C:2013:647, para 28.

³⁰ *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627, para 47, with references to *Fracasso and Leitschutz*, C-27/98, EU:C:1999:420, para 26; *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, para 34; *Universale-Bau*, C-470/99, EU:C:2002:746, para 89; and *Sintesi*, C-247/02, EU:C:2004:593, para 35.

contract, particularly in order to avoid distortions of competition based on discrimination and favouritism or, more generally, on the use of public procurement as a regulatory tool.³¹ Those obligations are not limited by the specific regime developed in the subsequent generations of public procurement Directives, but extend beyond their scope of application and impose direct duties that derive from the general principles of EU law.³² In that regard, the case law of the CJEU clearly shows how competition considerations limit Member States' discretion in the award of public contracts, and it is plagued with examples of Member States' circumvention of such pro-competitive requirements.³³ In the existing case law, the CJEU has not given any relevant weight to the intention of the contracting authorities (see further discussion below §II.A).

Recently, though, Article 18(1) of Directive 2014/24 has consolidated the principle of competition amongst the general principles of the EU public procurement system.³⁴ This provision offers direct normative support to restrict Member States' contracting authorities' discretion in the award of public contracts if the exercise of such discretion has a negative impact on competition, either for the specific contract or, more generally, in the market.³⁵ However, the drafting of the principle of competition in Article 18(1) of Directive 2014/24 has introduced a subjective element in the analysis by determining that '[t]he design of the procurement shall not be made with the intention ... of artificially narrowing competition'. This was not the original drafting of the principle in the 2011 proposal by the European Commission,³⁶ which aimed to consolidate the principle in the following terms: '*The design of the procurement shall not be made with the objective [...] of artificially narrowing competition*'.³⁷ Unfortunately, even after a review of the *travaux préparatoires*, the reasons behind this change in the drafting of the principle of competition remain a mystery.³⁸ The Council altered the Commission's proposal without offering any explanations,³⁹ which results in a clear need to engage in an interpretive exercise that goes beyond a contained construction of the principle within the limits of the Directive itself.

³¹ For extended discussion, see A Sanchez Graells, 'Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' (2016) *European Public Law Journal*, forthcoming.

³² C Risvig Hansen, *Contracts Not Covered or Not Fully Covered by the Public Sector Directive* (DJØF, 2012).

³³ The issue is particularly clear when it comes to the case law on the undue recourse to negotiated and other less than fully-competitive procedures. For discussion, see A Sanchez Graells, *Public Procurement and the EU Competition Rules*, 2nd ed (Hart, 2015) 258-80.

³⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

³⁵ For a first attempt to the interpretation of this principle, see A Sanchez Graells, 'Public Procurement: A 2015 Updated Overview of EU and National Case Law' (2015) *eCompetitions* 40647; and *ibid* (n 33) 207-14. Cf Arrowmish, Purpose of the EU Procurement Directives (n 28), and P Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2012-2013) 15 *Cambridge Yearbook of European Legal Studies* 283.

³⁶ European Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement*, 20 December 2011, COM(2011) 896 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF>, accessed 5 August 2015.

³⁷ This intentional element is common to different language versions of the Directive: 'intención' (Spanish), 'intention' (French), 'intento' (Italian), 'intuito' (Portuguese) or 'Absicht' (German). Thus, it cannot be justified as a deficiency in translation or an error in the wording of the provision.

³⁸ See Presidency compromise text of 24 July 2012, 12878/12, 2011/0438 (COD), available at <http://data.consilium.europa.eu/doc/document/ST-12878-2012-INIT/en/pdf>, accessed 9 December 2015.

³⁹ Art 15. For discussion of the legislative process that led to such alteration of the drafting, see A Sanchez Graells, 'A Deformed Principle of Competition? The Subjective Drafting of Article 18(1) of Directive 2014/24' in GS Ølykke and A Sanchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar) forthcoming. See also *ibid*, 'Public Procurement and Competition: Some Challenges Arising from Recent Developments in EU Public Procurement Law' in C Bovis (ed), *Research Handbook on EU Public Procurement Law*, Research Handbooks in European Law Series (Edward Elgar, 2016).

The literal wording of Article 18(1) of Directive 2014/24 thus creates the difficulty of assessing the intention of the contracting authority—which, by definition, is a legal entity that either forms part of the public sector of a Member State, including its emanations (ie bodies governed by public law), or is an entity that receives more than 50% of the funding for the specific procurement from the public sector.⁴⁰ Indeed, Article 18(1) provides a formulation of the principle of competition in which the subjective or intentional element of any restriction of competition is emphasized. This intentional element is common to different language versions of the Directive,⁴¹ so it cannot be justified as a deficiency in translation or an error in the wording of the provision. The recitals of the Directive do not provide any clarification either and, ultimately, this provision can open the door to complex problems of identification and attribution of intentional elements in the field of public procurement—which are exactly the sort of difficulties mentioned above (§I). In order to overcome such interpretative difficulties, it is worth ascertaining to what extent it is possible to rely on an ‘objectification’ of the analysis of intentional elements in the existing case law of the CJEU in the area of EU public procurement.

A. ‘Objectified’ Assessment of Intent in Public Procurement Case Law

Before the adoption of Directive 2014/24, there had been other sorts of prohibitions in the public procurement setting that included an ‘intentional element’, such as the traditional prohibition of calculating the value of the contract in a way that makes it remain below the value thresholds that trigger the application of the EU public procurement Directives and, ultimately, allows the contracting authority to avoid them. Under the applicable rules, it is clear that ‘[t]he choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive’ and, in particular, that a ‘procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons’.⁴²

In that regard, it is important to stress that the CJEU departed from the literal wording of that provision—which requires an intentional element identical to that of Article 18(1) of Directive 2014/24—and clearly adopted an objective assessment based on the effects and consequences of the contracting authorities’ decisions concerning the estimation of the value of contracts that should have been tendered under the applicable EU rules. In a consistent line of case law, the CJEU stressed that the analysis needs to be based on objective elements that create *indicia* of the intentional artificial split of the contract, such as ‘*the simultaneous issuance of invitations to tender ... similarities between contract notices, the initiation of contracts within a single geographical area and the existence of a single contracting authority*’ all of which ‘*provide additional evidence militating in favour of the view that, in actual fact, the separate works contracts relate to a single work*’.⁴³ Indeed, the intentional element has

⁴⁰ See Articles 2(1) and 13 of Directive 2014/24. For discussion on the coverage of the Directive, see S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol. 1, 3rd ed (Sweet & Maxwell, 2014) 339-83.

⁴¹ "Intención" (Spanish), "intention" (French), "intento" (Italian), "intuito" (Portuguese) or "Absicht" (German).

⁴² See Article 5(3) of Directive 2014/24, which absorbed the content of Article 9(7) of Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114. Previously, see Article 6 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L 199/54.

⁴³ As stressed very recently, see *Spain v Commission*, T-384/10, EU:T:2013:277, paras 65-68 (emphasis added); the Judgment has, however, been set aside on appeal by CJEU on procedural issues (disregard of a time limit by the Commission); see *Spain v Commission*, C-429/13 P, EU:C:2014:2310. Nonetheless, the same wording had been used in *Commission v France*, C-16/98, EU:C:2000:541; *Commission v Italy*, joined cases C-187/04 and C-188/04, EU:C:2005:652; *Auroux and Others*, C-220/05, EU:C:2007:31; and *Commission v Germany*, C-574/10, EU:C:2012:145.

been excluded where, on the basis of such analysis, there were *objective reasons* that justified the decision adopted by the contracting authority.⁴⁴ Moreover, the prohibition of artificially splitting the contract with the intention of circumventing the application of the EU procurement rules has been applied directly to determine the incompatibility of legal rules that objectively diminished the applicability of the relevant directives, without engaging in any sort of subjective assessment (which would have been impossible).⁴⁵ Therefore, it seems plain to conclude that, in the assessment of an identical (apparent) subjective element of intention, the CJEU has ‘objectified’ the test applicable to determine the existence of an eventual infringement of the EU public procurement directives.

It is true that the CJEU has not gone as far as simply presuming the existence of the intention to avoid the applicability of the EU procurement rules in all cases. As aptly put by Advocate General Trstenjak,

Although the Court is decidedly strict in its examination of that prohibition, such intention to circumvent cannot be presumed without more. Each individual case in which a contract was split for the purposes of an award must be examined according to its context and specificities and, in that regard, particular attention must be given to whether there are good reasons pointing in favour of or, on the contrary, against the split ...⁴⁶

However, the need to carry out a case by case analysis does not detract from the fact that the CJEU has excluded any consideration of the subjective intention of the contracting authority or any of its members. This was made exceedingly clear in a recent Judgment, whereby the General Court (GC) stressed that

a finding that a contract has been split in breach of European Union procurement legislation does not require proof of a subjective intention to circumvent the application of the provisions contained therein ... it is irrelevant whether the infringement is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it ... the Court considered that for the purpose of finding [an infringement] it was not necessary ... to show beforehand that the Member State concerned intended to circumvent the obligations ... by splitting the contract.⁴⁷

Overall, thus, when it comes to the assessment of the seemingly subjective element included in the anti-circumvention provisions in the successive generations of procurement Directives, the existing case law of the CJEU clearly established that the analysis solely needs to be conducted on the basis of objective evidence and arguments regarding two aspects: firstly, whether *objectively* the conduct of the contracting authority created the *effect* proscribed by the rule and, secondly, whether there were *objective good reasons* for such behaviour (ie, an alternative explanation to the then presumed intention to circumvent). It could not be more objective and, clearly, no further proof of a subjective intention to circumvent the application of the EU public procurement rules is required.

The same line of reasoning can be found in cases dealing more generally with infringements of specific obligations concerning the choice of particular procurement procedures. Generally, contracting

⁴⁴ *Swoboda*, C-411/00, EU:C:2002:660, paras 57-60.

⁴⁵ *Commission v Italy*, C-412/04, EU:C:2008:102, paras 72-74.

⁴⁶ Opinion of AG Trstenjak in *Commission v Germany*, C-271/08, EU:C:2010:183, para 165 (emphasis added and references omitted). *cf* Opinion of AG Jacobs in *Commission v France*, C-16/98, EU:C:2000:99, para 38, where the AG stresses that the intentional or subjective element cannot be eliminated, but suggests that the applicable test still lies on whether the decision under assessment can be ‘*justified on objective grounds*’.

⁴⁷ *Spain v Commission*, T-384/10, EU:T:2013:277, para 95 (references omitted).

authorities have shown a clear tendency towards abusing the grounds that authorise resorting to non-competitive procedures and, in particular, negotiated procedures without prior publication of contract notices⁴⁸—which allow them to proceed to a direct award of the contract, with the exclusion of any competition therefor. Given the gravity of such violation of the EU public procurement rules, if they entered into a direct award in violation of the limited grounds that authorised such non-competitive procedure, the contract would be declared ineffective under the applicable remedies Directive.⁴⁹

One way of avoiding the ineffectiveness of those contracts would be for contracting authorities to publish voluntary transparency notices disclosing the reasons why they considered that such direct award was lawful. This possibility has also proven controversial and contracting authorities have been accused of using it strategically, with the intention of avoiding the ineffectiveness of contracts that they knew (or ought to have known) that they were directly awarding in contravention of the applicable rules. This gave rise to a recent case before the CJEU, where Advocate General Bot proposed a stringent test whereby the protection derived from the publication of the voluntary transparency notice would only be declined if ‘*the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure*’.⁵⁰ This would have, once more, created a problematic test based on subjective elements privy to the contracting authority. However, the CJEU rejected the test proposed by AG Bot and ruled that

the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in [the Directive] were in fact satisfied.⁵¹

Consequently, it seems clear that the interpretation of the conditions for the exception to the ineffectiveness to apply need to be restrictive and ultimately rely on objective tests, without any consideration being paid to the (presumed) intention of the contracting authority.⁵²

Finally, it is worth stressing that the intention of the contracting authority that enters into an illegal direct award has also been considered irrelevant even where the direct award is the *supervening result* of the privatisation of the public entity with which the agreement was initially concluded.⁵³ In that case, the CJEU ruled that

by means of an artificial construction comprising several distinct stages, namely the establishment of [the company], the conclusion of the ... contract with that company and

⁴⁸ Such grounds need to be interpreted strictly, as repeatedly stressed by the CJEU. See *Commission v Italy*, 199/85, EU:C:1987:115, para 14; *Commission v Italy*, C-57/94, EU:C:1995:150, para 23; *Commission v Germany*, C-318/94, EU:C:1996:149, para 13; *Commission v Germany*, joined cases C-20/01 and C-28/01, EU:C:2003:220, para 58; *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, para 46; and *Commission v Germany*, C-480/06, EU:C:2009:357, paras 34-35.

⁴⁹ See Art 2d of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC. Consolidated version available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:en:PDF>, accessed 5 August 2015.

⁵⁰ Opinion of AG Bot in *Fastweb*, C-19/13, EU:C:2014:266, paras 16, 92, 100 and 115 (emphasis added).

⁵¹ *Fastweb*, C-19/13, EU:C:2014:2194, para 50 (emphasis added). See A Brown, ‘When Will Publication of a Voluntary Ex Ante Transparency Notice Provide Protection against the Remedy of Contract Ineffectiveness? Case C-19/13 Ministero Dell’interno v Fastweb Spa’ (2015) 24 (1) *Public Procurement Law Review* NA10.

⁵² See R Caranta, ‘Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation’ (2015) 8 (1) *Review of European Administrative Law* 75, 83-84.

⁵³ *Commission v Austria (Mödling)*, C-29/04, EU:C:2005:670.

the transfer of 49% of its shares to [a private investor], a public service contract was awarded to a semi-public company 49% of the shares in which were held by a private undertaking ... the award of that contract must be examined taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order ... To examine ... the award of the public contract at issue only from the standpoint of the date on which it took place, without taking account of the effects of the transfer within a very short period of 49% of the shares ... would prejudice the effectiveness of [the public procurement] Directive.⁵⁴

Once more, this supports an interpretation of the existing case law as providing strong support to ‘objectifying’ the analysis of subjective elements in public procurement rules, which would ultimately result in an objective assessment of the decision adopted by the contracting authority.⁵⁵

B. An ‘Objectified’ Interpretation of Article 18(1) of Directive 2014/24

The case law of the CJEU regarding the anti-circumvention provisions in the successive generations of procurement Directives (above §II.A) provides strong support for an ‘objectified’ interpretation of Article 18(1) of Directive 2014/24. Regardless of its literal wording, it is submitted that the only avenue to approach the interpretation and enforcement of Article 18(1) of Directive 2014/24 in a *possibilistic and pragmatic manner* is to derive the element of intention to restrict or distort competition (ie, to artificially narrow it) from a *reasonable objective assessment of the concurring circumstances, so that intention is inferred or derived from the effects or consequences of the way in which the procurement procedure is designed and carried out by the contracting authority*. In the end, the context in which the distortions or restrictions of competition take place will be a determinant for their existence and little else identifiable can give meaning to the (implicit) intention of the contracting authority to artificially narrow down competition.

Such ‘objectification’ of the principle of competition consolidated in Article 18(1) of Directive 2014/24 should be carried out by establishing a *rebuttable presumption of restrictive intent* in cases where, in fact, the tendering procedure has been designed in a manner that is *in fact* restrictive of competition. The disproof of this rebuttable presumption would require the contracting authority or entity to justify the existence of objective, legitimate and proportionate reasons for the adoption of the criteria restrictive of competition⁵⁶—ie, to provide a plausible justification on objective grounds for the imposition of restrictive conditions of competition in tendering the contract, so as to exclude the plain and simple explanation that it was otherwise simply intended to restrict competition therewith.⁵⁷ In other words, if it could be justified that a ‘reasonable and disinterested contracting entity’ (meaning free from

⁵⁴ Ibid, paras 40-42.

⁵⁵ Similar tests have been proposed in relation to choice of procedures, which has always been limited by exhaustive lists of grounds; see S Arrowsmith and S Treumer, ‘Competitive Dialogue in EU law: a Critical Review’ in *ibid* (eds), *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012) 3, 46 (with reference to decisions made by a ‘reasonable contracting authority’); and P Telles and L Butler, ‘Public Procurement Award Procedures in Directive 2014/24/EU’ in F Lichère, R Caranta and S Treumer (eds) *Novelties in the 2014 Directive on Public Procurement*, vol. 6 European Procurement Law Series, (DJØF, 2014) 131, 146 (who would nonetheless allow contracting authorities to make subjective assessments).

⁵⁶ This is the approach to the enforcement of the prohibition of Article 102 TFEU in cases of predatory pricing. For discussion, see below §IV.A.

⁵⁷ Similarly, this was the interpretation presented by the Commission when the rule preventing the artificial split of contracts was first assessed; see European Commission, *Guide to the Community Rules on Public Works Contracts other than in the Water, Energy, Transport and Telecommunications Sectors (Directive 93/37/EEC)* (1993) 17, available at http://ec.europa.eu/internal_market/publicprocurement/docs/guidelines/works_en.pdf, accessed 5 August 2015.

any intent to restrict competition) would have taken the same decision on the design of the tender in a form restrictive of competition, the presumption of restrictive intent would not be applicable and, ultimately, the tender would be compliant with Article 18(1) of Directive 2014/24. Obviously, this test requires some further development and the CJEU will most likely have the opportunity to address these issues in the future. However, it is submitted that the discussion above shows that the CJEU has engaged in such interpretative strategy for quite a long time in the field of EU public procurement. As discussed below, very similar developments can be identified in the area of State aid.

III. ASSESSMENT OF INTENT UNDER EU STATE AID RULES

State aid is prohibited by Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) where a set of objective conditions are met.⁵⁸ The enforcement of this prohibition has never taken into account the subjective intention of the Member State,⁵⁹ and it is commonplace that the prohibition is enforced in an objective manner.⁶⁰ The CJEU has repeatedly clarified that Art 107(1) TFEU ‘*does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects*’;⁶¹ or, even more clearly, that ‘*Article 107(1) TFEU defines measures of State intervention in relation to their effects*’.⁶² However, in a recent case involving a complex or two-part State aid measure, the issue of the *actual* intention of the Member State engaged in the alleged infringement of Article 107(1) TFEU was raised in a way that can shed some light on our discussion.

In the case at hand, and in a simplified manner, Magyar Olaj- és Gázipari Nyrt (MOL) and the Hungarian State entered into an authorisation agreement in 2005 whereby the mining rights assigned to MOL were extended and the mining fees payable in consideration for those rights were determined on a non-revisable basis for the period 2005-2020. Later, a 2008 legal reform significantly increased the mining fees that would have been payable for the exploitation of those same fields. However, in view of the 2005 agreement, MOL was exempted from topping up the mining fees it was liable to pay. Competitors of MOL and potential new entrants were subject to the revised higher fees. Unsurprisingly, the European Commission took the view that, given the way the 2005 agreement and the provisions of the 2008 amendment had been designed, they should be regarded as part of the same measure and it concluded that their combined effect conferred an unfair advantage to MOL. According to the Commission, even if the 2005 agreement was concluded in accordance with the Mining Act then in force and even if it was up to the Member State to set the mining fees, the cumulative effects produced by both measures were not necessarily compatible with the State aid rules of the TFEU—even if, taken in isolation, neither the 2005 agreement nor the 2008 amendment were contrary to these rules.

⁵⁸ C Quigley, *European State Aid Law and Policy*, 3rd ed (Hart, 2015) 3-52; K Bacon, *European Union Law of State Aid*, 2nd ed (Oxford University Press, 2013) 19-90. See also the draft Commission *Notice on the notion of State aid pursuant to Article 107(1) TFEU*, 17 January 2014, available at http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf, accessed 5 August 2015.

⁵⁹ L Hancher, T Ottervanger and PJ Slot, *EU State Aids*, 4th ed (Sweet & Maxwell, 2012) 53.

⁶⁰ P Craig and G De Búrca, *EU Law. Texts, Cases and Materials*, 6th ed (Oxford, 2015) 1133.

⁶¹ See *Italy v Commission*, 173/73, EU:C:1974:71, para 13. See also *France v Commission*, C-241/94, EU:C:1996:353, and *France v Commission*, C-251/97, EU:C:1999:480. Recently, see *Spain v Commission*, C-409/00, EU:C:2003:92, para 46.

⁶² *Bouygues and Bouygues Télécom v Commission and Others*, C-399/10 P, EU:C:2013:175, para 102. See also *Commission v EDF and Others*, C-124/10 P, EU:C:2012:318, para 77 and the case-law cited. For discussion, see A Sanchez Graells, ‘Bringing the “Market Economy Agent” Principle to Full Power’ (2012) 33 (10) *European Competition Law Review* 35.

The Commission considered that the measure fulfilled the criteria enshrined in Article 107(1) TFEU and should be considered as State aid, and that there was nothing to indicate that it could be compatible with the internal market. The Hungarian authorities challenged the Commission's position before the GC arguing that the measure did not constitute State aid because the 2005 agreement conferred MOL no advantage and was not selective. Addressing this point of law, the GC embarked upon an analysis whereby the *intention* of the Hungarian authorities would have been determinative of the outcome of the case. In view of the GC,

for the purposes of Article 107(1) TFEU, a single aid measure may consist of combined elements on condition that, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another (see, to that effect, Joined Cases C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others* [2013] ECR I-0000, paragraphs 103 and 104). In that context, a combination of elements such as that relied upon by the Commission in the contested decision may be categorised as State aid where the State acts in such a way as to protect one or more operators already present on the market, by concluding with them an agreement granting them fee rates guaranteed for the entire duration thereof, whilst having the intention at that time of subsequently exercising its regulatory power, by increasing the fee rate so that other market operators are placed at a disadvantage, be they operators already present on the market on the date on which the agreement was concluded or new operators.⁶³

Once more, this would have created the need to assess a subjective element in the granting of State aid. The Commission strongly criticised this Judgment of the GC and challenged it on the basis that it disregarded the settled case-law of the CJEU to the effect that ‘Article 107(1) TFEU defines State interventions on the basis of their effects, and independently of the techniques used by the Member States to implement their interventions’.⁶⁴ As commented elsewhere, in my view, if Article 107(1) TFEU is meant to avoid distortions of competition in the internal market, when confronted with sequential, two-part or complex aid measures, the fact that they all formed part of a ‘master plan’ from the outset or are the ‘random or supervening’ result of discrete interventions should be irrelevant. Otherwise, the burden of proving ‘distortive intent’ by the granting Member State from the outset may simply have made it impossible to pursue these cases.⁶⁵

On appeal, the CJEU disagreed with the GC—or, more correctly, reinterpreted the reasoning of the GC—and stressed the irrelevance of the intention of the Member State. According to the CJEU,

the General Court merely applied the case-law laid down by the Court of Justice in the judgment in *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175), to which the General Court also expressly referred in paragraph 67 ..., and according to

⁶³ *MOL v Commission*, T-499/10, EU:T:2013:592, para 67 (emphasis added).

⁶⁴ *Commission v MOL*, C-15/14, EU:C:2015:362, para 86; with reference to inter alia, judgments in *Belgium v Commission*, C-56/93, EU:C:1996:64, para 79; *Belgium v Commission*, C-75/97, EU:C:1999:311, para 25; *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, para 89; and *Commission v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paras 91, 92 and 98.

⁶⁵ A Sanchez Graells, ‘GC rules on two-part State aid measures and selectivity under Art 107(1) TFEU (T-499/10)’, *howtocrackanut*, 12 November 2013, available at <http://howtocrackanut.blogspot.co.uk/2013/11/gc-rules-on-two-part-state-aid-measures.html>, accessed 5 August 2015.

which, since State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case, in particular when consecutive interventions, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely related to each other that they are inseparable from one another.⁶⁶

Even if it could have been clearer,⁶⁷ with this sort of reinterpretation, the CJEU dispelled the possible creation of a subjective test in the assessment of State aid measures and, once more, provided support to the general thesis advanced in this paper—whereby subjective elements in core prohibitions of EU economic law applicable to the public sector, or which require direct intervention by a public administration, need to either be excluded; or, where existing, their assessment needs to be ‘objectified’, so that the intention of the State and its emanations is assessed by a mix of presumptions and objective criteria that allow for a contextual analysis of the behaviour deemed to breach EU law. This is not solely consistent with the case law of the CJEU in relation to public procurement (§II.A) and State aid (here, §III), but also comparable with the solutions given in other areas of EU economic law, which can serve as useful benchmarks, as discussed in the following section.

IV. BENCHMARKS IN OTHER AREAS OF EU ECONOMIC LAW

A. Coordination with the Enforcement of EU Antitrust Rules

Beyond the support in the case law of the CJEU, the reasons for the ‘objectification’ of the assessment of subjective elements in core prohibitions of EU economic law applicable to the public sector, or which require direct intervention by a public administration, are multiple. Bearing in mind the need for consistency in different sets of rules concerned with the protection of undistorted competition in the market—as required by Article 3(3) of Treaty on European Union (TEU), Article 3(1)(b) TFEU and Protocol (27) TFEU—a rather compelling reason for such ‘objectification’ can be derived from systemic considerations and, ultimately, from the need for coordination with some ‘functional neighbours’. In particular, such coordination should take into account the objective character of the restrictions of competition derived from the TFEU and its interpretation by the CJEU. Indeed, the prohibitions in Articles 101 and 102 TFEU apply almost in absolute abstraction from any volitional element of the offending parties⁶⁸—that is, undertakings infringing competition law can be sanctioned without them having ‘an intention actually to violate’ the applicable rules.⁶⁹ This applies both to coordinated behaviour prohibited by Article 101 TFEU,⁷⁰ and to unilateral behaviour prohibited by Article 102 TFEU—which enforcement has moved from early cases (*eg* on predatory pricing) where

⁶⁶ *Commission v MOL*, EU:C:2015:362, para 97 (emphasis added).

⁶⁷ A Sanchez Graells, ‘CJEU implicitly rejects GC's views on subjective assessment of two-part State aid measures under Art 107(1) TFEU (C-15/14)’, *howtocrackanut*, 8 June 2015, available at <http://howtocrackanut.blogspot.co.uk/2015/06/cjeu-implicitly-rejects-gcs-views-on.html>, accessed 5 August 2015.

⁶⁸ On the issue of the assessment of subjective intention for the purposes of enforcing Art 101 TFEU, see O Odudu, ‘Interpreting Article 81(1): Object as Subjective Intention’ (2001) 26 *European Law Review* 60-75. For a comparative perspective, see also *ibid*, ‘The Role of Specific Intent in Section 1 of the Sherman Act: A Market Power Test?’ (2002) 25 *World Competition* 463-491.

⁶⁹ P Whelan, *The Criminalization of European Cartel Enforcement* (Oxford University Press, 2014) 86-89 and 108-13. See also WPJ Wils, *The Optimal Enforcement of EC Antitrust Law. Essays in Law & Economics* (Kluwer, 2002) 163-87; *ibid*, *Efficiency and Justice in European Antitrust Enforcement* (Hart, 2008) 157.

⁷⁰ A Jones, ‘Left Behind by Modernisation? Restrictions by Object under Article 101(1)’ (2010) 6 (3) *European Competition Journal* 649.

there were references to the value of intention of the dominant undertaking,⁷¹ towards a more effects-based approach to its enforcement that is detached from the existence of any (predatory) intention.⁷² Arguments regarding lack of subjective intention whereby the parties claim that they did not intend to restrict competition are not a valid defence and, ultimately, '*the parties' subjective intent cannot be relied upon to exculpate otherwise unlawful behaviour*'.⁷³ Indeed, the EU Courts have repeatedly upheld that

for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules; it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition.⁷⁴

Hence, a competitive restriction in the market (almost) automatically results in a violation of those prohibitive norms, irrespective of the *actual* intention with which market players have conducted the practice restrictive of competition.⁷⁵ It is remarkable that undertakings cannot escape the imposition of a fine even where the infringement has resulted from their erring as to the lawfulness of their conduct on account of the terms of legal advice given by a lawyer,⁷⁶ which further erodes the existence of any meaningful subjective assessment at the stage of establishing an infringement of the EU *antitrust* prohibitions.⁷⁷ The only exception will come where there was clearly no negligence in the oversight of the development of a market activity with potential competition-restricting effects,⁷⁸ and where the

⁷¹ *AKZO v Commission*, C-62/86, EU:C:1991:286. For discussion, see L Philips and IM Moras, 'The Akzo Decision: A Case of Predatory Pricing?' (1993) 41(3) *Journal of Industrial Economics* 315-321, 316.

⁷² *Eg Post Danmark*, C-23/14, EU:C:2015:651. For a clear-cut discussion of the consolidation of this trend, see P Ibáñez Colomo, '*Post Danmark II*: The Emergence of a Distinct 'Effects-Based' Approach to Article 102 TFEU' (2016) 7(2) *Journal of European Competition Law & Practice* 113-115. For background discussion, see WPJ Wils, 'The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37(4) *World Competition* 405-434; P Rey and JS Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38(1) *World Competition* 3-29; and P Ibáñez Colomo, 'Intel and article 102 TFEU case law: making sense of a perpetual controversy' (2014) LSE Law, Society and Economy working paper series 29/2014, available at https://www.lse.ac.uk/collections/law/wps/WPS2014-29_Colomo.pdf, accessed 11 April 2016. Similar issues are discussed in other jurisdictions, such as Australia; see KA Kemp, 'A Third Way: Objective Anticompetitive Purpose' (2016) UNSW Law Research Paper No. 2016-22, available at <http://ssrn.com/abstract=2735898>, accessed 11 April 2016.

⁷³ Jones (n 70) 664. See also S King, *Agreements that restrict competition by object under Article 101(1) TFEU: past, present and future* 121-124 (2015) PhD Thesis, London School of Economics, available at http://etheses.lse.ac.uk/3068/1/King_Agreements_that_restrict_competition_by_object_under_Article_101.pdf, accessed 9 December 2015.

⁷⁴ *Ferriere Nord v Commission*, T-143/89, EU:T:1995:64, para 41. This has been repeatedly emphasised. Most recently, in *Romana Tabacchi v Commission*, T-11/06 T:2011:560, para 227. See also ten Voorde (n **Error! Bookmark not defined.**) 558 fn 3.

⁷⁵ This is related to the issue of the prohibitions of restrictions of competition by object, which has arisen mainly in a recent stream of case law; see *Expedia*, C-226/11, EU:C:2012:795 and *Maxima Latvija*, C-345/14, EU:C:2015:784. For additional discussion, see Commission Staff Working Paper, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice* (SWD(2014) 198 final). See a Jones (n 73); D Bailey, 'Restrictions of Competition by Object under Article 101 TFEU' (2012) 49 (2) *Common Market Law Review* 559-99; and G Bushell and M Healy, 'Expedia: The de minimis Notice and 'by object' Restrictions' (2013) 4 (3) *Journal of European Competition Law & Practice* 224-26.

⁷⁶ *Schenker and Others*, C-681/11, EU:C:2013:404, para 43.

⁷⁷ However, subjective elements can be relevant in terms of determination of the amount of the fine, and there are cases where the impossibility or high difficulty in assessing the existence of an anticompetitive conduct has been taken into account by the imposition of symbolic or token fines. For an overview, see S Marco Colino, *Competition Law of the EU and UK*, 7th ed (Oxford, 2011) 111-112.

⁷⁸ *General Motors v Commission*, C-26/75, EU:C:1975:150. See also *voestalpine and voestalpine Wire Rod Austria v Commission*, T-418/10, EU:T:2015:516.

undertakings, upon discovery of any infringement, take positive steps to publicly distance themselves from its content or report it to the administrative authorities.⁷⁹

Overall, it is quite clear that the case law concerning the enforcement of *antitrust* prohibitions gives almost no weight whatsoever to the assessment of subjective elements and relies on objective prohibitions and the assessment of objective circumstances surrounding their infringement. Thus, from a systematic perspective, it is submitted that this string of case law provides further support to the ‘objectification’ of subjective analysis when it comes to the behaviour of public authorities and its effects, particularly in view of the duty of the public administration to *act legally* (discussed below §V).

B. Coordination with the ‘Objectification’ of Other EU Economic Law Core Prohibitions

A similar reasoning derives from the case law in other areas of EU economic law, such as non-discrimination law (§IV.B.1), or the rules applicable to financial sanctions derived from infringements of the common agricultural policy (§IV.B.2).

1. EU non-discrimination law

Indeed, in order to prove cases of direct discrimination, it is common ‘to view direct discrimination as an objective question focusing on the *effects of the perpetrator’s actions*’.⁸⁰ This was the approach adopted by the CJEU in a seminal case on direct sex discrimination where a pregnant woman claimed protection against direct sex discrimination when she was not employed due to her pregnancy and despite being the best candidate. The CJEU agreed and stressed that ‘*only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex*’.⁸¹ The employer argued in its defence that it had no intention to discriminate against women because, in fact, all applicants for the job were women and, thus, the person eventually employed was a woman as well. The CJEU dismissed the argument on the basis that ‘*whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal. If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate*’.⁸² Hence, it is clear that the CJEU assesses direct discrimination on the basis of the effects of the conduct and not intention.⁸³

Similarly, in the area of indirect discrimination, the CJEU was quick to abandon the requirement of intent initially created by its own case law in order to find breaches of EU economic law. Given the difficulty of proving a discriminatory intention in those cases—which, by their very nature, are concerned with non-immediate consequences of even voluntary actions—the CJEU clarified that the relevant test to find an infringement of EU non-discrimination law is whether the ‘*practice may be explained by objectively justified factors unrelated to any discrimination*’.⁸⁴

⁷⁹ *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, para 31; *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paras 142-143.

⁸⁰ M Bell, ‘Direct Discrimination’ in D Schiek, L Waddington and M Bell, *Non-Discrimination Law* (Hart, 2007) 185, 228.

⁸¹ *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88, EU:C:1990:383, para 12.

⁸² *Ibid*, para 17.

⁸³ For further discussion on issues related with different linguistic versions of the *Dekker* Judgment, see L Mulders, ‘Translation at the Court of Justice of the European Communities’, in S Prechal and B van Roermund (eds), *Coherence in EU Law. The Search for Unity in Divergent Concepts* (Oxford University Press, 2008) 45-59, 51.

⁸⁴ *Bilka v Weber von Hartz*, 170/84, EU:C:1986:204, para 30 (emphasis added). See D Schiek, ‘Indirect Discrimination’ in *Non-Discrimination Law* (n 80) 323, 356-57.

2. EU common agricultural policy and financial sanctions resulting from its breach

Along the same lines, in areas of EU law that carry direct financial sanctions, such as the regulation of infringements of the common agricultural policy, the CJEU has also been willing to rely on objective factors to assess the intentionality of specific breaches.⁸⁵ Such intentional element is relevant because it carries out a reduction in the EU funding received that would not be imposed in case of unintentional (ie non-negligent) breaches. In a recent case, after reducing the level of intention to a knowledge-based test whereby the subjective element of the prohibition is present if the infringer ‘*accept[s] the possibility that non-compliance may result*’ from its acts;⁸⁶ the CJEU accepted that the proof of that subjective element could be satisfied on the basis of objective indicia, amongst which it included the fact that the contravened requirement was ‘*a long-established, settled policy*’. In such circumstances, the CJEU stressed that ‘*where a Member State introduces a provision which ... establishes as such a criterion [to determine that non-compliance was intentional] the existence of a long-established, settled policy and which gives a high probative value to that criterion, that State must nevertheless make it possible for the beneficiary of aid to adduce evidence of the lack of intent in his conduct*’.⁸⁷ This comes to result in a rebuttable presumption of intent,⁸⁸ which is in line with the proposal outlined regarding the test applicable to the public administration (above §II).

3. Overall preliminary assessment

As seen in this sub-section, even in areas of EU economic law of a stronger social nature and with a weaker link to the functioning of the internal market, or with a closer connection to criminal law, the CJEU has been willing to erode the relevance of subjective assessments—or, in other words, to simply substitute them with objective analyses of the context in which the practices deemed to infringe EU law take place and the objective good reasons or factors than can justify them, or that can support a finding of the existence (presumption) of intent. This provides further support for the thesis advanced in this paper that the assessment of subjective elements in core EU economic law prohibitions needs to be ‘objectified’. It is submitted that this is particularly clear if the interplay of such assessment with the right to good administration is considered in further detail.

V. INTERPLAY WITH GENERAL PROTECTIONS AGAINST BEHAVIOUR OF A PUBLIC ADMINISTRATION IN BREACH OF EU LAW

The discussion in previous sections has shown how, overall, there is strong support in the case law of the CJEU for a minimisation of the relevance of subjective elements in core EU economic law prohibitions and a subsequent ‘objectification’ of the assessment of the intention of the State and its emanations—for simplicity, the public administration—when it engages in activity deemed to breach EU law. This section assesses the fit or contradiction of this approach with more general protections against behaviour of a public administration in breach of EU law. The compatibility or otherwise of such approach is first assessed in relation to the right to good administration in Article 41 Charter; and then in relation to the doctrine of State liability for infringement of EU law. These assessments are intended to shed some light on the consistency or incompatibility of the standards of liability applicable to the assessment of the behaviour of a public administration under EU economic law—or, reversely, to support a corollary to the thesis advanced in this paper: ie, that an ‘objectified’ assessment of

⁸⁵ See ten Voorde (n **Error! Bookmark not defined.**) *in totum*.

⁸⁶ See Judgment in *van der Ham and van der Ham-Reijersen van Buuren*, C-396/12, EU:C:2014:98, para 35.

⁸⁷ *van der Ham*, EU:C:2014:98, para 41.

⁸⁸ Ten Voorde (n **Error! Bookmark not defined.**) 564-66.

subjective elements in core EU economic law prohibitions applicable to the public administration does not distort the general system of liability derived from EU law.

A. Interplay with the Right to Good Administration

It is submitted that the ‘objectified’ analysis of subjective elements in core prohibitions of EU economic law is consistent with the right to good administration in Article 41 Charter and its implied requirement for the public administration to *act legally*⁸⁹—or, more clearly, to comply with EU law, or to ‘act *under and within the law*’.⁹⁰ The same requirement derives from the *principle of sincere cooperation* in Article 4(3)II TEU, whereby the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union—which covers compliance with both primary and secondary EU law.⁹¹

Under Article 41 Charter, which is engaged when EU law is (or should have been) applied,⁹² the public administration has an obligation to give reasons for its decisions. Importantly, such an obligation to give reasons ‘*is not motivated by the care for democracy and political accountability, but it is rather aimed at ensuring that the Court can exercise its power to review the legality of the measure*’.⁹³ This has been quite clearly and consistently stressed by the CJEU and the GC:

the statement of reasons required by ... Article 41 of the Charter of Fundamental Rights must be appropriate to the measure at issue and to the context in which it was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case.⁹⁴

It is worth stressing that this is the *functional* understanding of the duty to provide reasons resulting from the right to good administration. Even if in the Charter the underpinning ‘*principles of administrative law are not put in terms of objective legality in the public interest, but in the language of subjective public rights*’,⁹⁵ the obligation of the public administration to act in compliance with EU law clearly stands unaltered,⁹⁶ is actionable as an individual right, and the reasons given by the public

⁸⁹ See P Craig, ‘Article 41 – Right to Good Administration’ in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014) 1069-98.

⁹⁰ By analogy, HCH Hofmann, ‘General Principles of EU Law and EU Administrative Law’ in C Barnard and S Peers, *European Union Law* (Oxford, 2014) 198, 206.

⁹¹ J Temple Lang, ‘The Duty of National Authorities under European Constitutional Law’ (1998) 23 *European Law Review* 109.

⁹² A Rosas, ‘When Is the EU Charter of Fundamental Rights Applicable at National Level?’ (2012) 19 (4) *Jurisprudence* 1269, 1277-81.

⁹³ J Dutheil de la Rochère, ‘The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration’ in A Arnall, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008) 157, 169. See also K Kanska, ‘Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights’ (2004) 10 (3) *European Law Journal* 296, 320.

⁹⁴ *Trabelsi and Others v Council*, T-187/11, EU:T:2013:273, para 66 (emphasis added). See also *Organisation des Modjahedines du peuple d’Iran v Council*, T-228/02, EU:T:2006:384, para 141 and the case-law cited; and *Al Matri v Council*, T-200/11, EU:T:2013:275, para 29. See also *Council v Bamba*, C-417/11 P, EU:C:2012:718, para 50 and the case-law cited.

⁹⁵ Dutheil de la Rochère (n 93) 168.

⁹⁶ HCH Hofmann and C Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9 (1) *European Constitutional Law Review* 73, 87.

administration to justify compliance with EU law are subject to judicial review in order to determine whether the public administration acted legally in the first place.⁹⁷

When this duty to act legally and to allow for a judicial review of administrative acts through the provision of sufficient reasons is taken into consideration, the existence of subjective elements in core prohibitions of EU economic law applicable to the public administration becomes a clear *legal aberration*, unless the objective assessment proposed herewith is kept and the public administration is not given discretion to engage in *illegal behaviour*. Indeed, if the public administration is bound to comply with EU law as a result of the duty of sincere cooperation in Article 4(3)II TEU and the specific requirements of the right to good administration in Article 41 Charter, there is no scope for it to validly deviate from such duty to *act legally*—ie, there is no scope to create discretion to engage in illegal behaviour, whatever the reasons. The standard of assessment of the activity of the public administration needs to be objective and, in that setting, only two outcomes are possible: either the public administration complied with EU law, or it did not; and it is irrelevant to engage in an assessment of whether, in case of non-compliance, it did so voluntarily or negligently.

In almost all cases, the public administration *knows or ought to have known* that it was infringing EU law; and this should trigger liability and remedies (see discussion on State liability below §V.B). In the remaining minority of cases, where there was no negligence whatsoever by the public administration, the only way to justify an infringement of EU law would be to demonstrate that it acted diligently and relied on *objectively good reasons* to take the course of action that resulted in a breach of EU law—which brings consistency with the standard applicable to private undertakings and corporate actors under eg antitrust and non-discrimination law (above §IV). It is also compatible with the tests developed by the CJEU in the areas of public procurement (§II.A) and State aid law (§III), as well as the assessment for the purposes of State aid liability (§V.B). This is, thus, a sound systemic approach to the assessment of subjective elements in core prohibitions of EU economic law. Conversely, any approach that deviated from such objective analysis of the conditions in which a specific decision was adopted and the reasons provided thereof, would potentially breach the right to good administration in Article 41 Charter. It would do so by creating excessive space for *illegal*, or at least non-fully compliant, behaviour by the public administration in contravention of EU law.

Moreover, the objective reasons given by the public administration in justification of any acts that deviate from the expected legally-compliant standard will need to be subjected to a strict proportionality assessment, particularly if the specific regulatory regime being infringed includes corrective mechanisms,⁹⁸ or has built-in provisions that address the concerns or justifications provided by the public administration.⁹⁹ In other words, a public administration will not be able to rely on otherwise good objective reasons for its non-compliant behaviour if such considerations should have been channelled differently, or were generally constrained by the policy options implicit in the

⁹⁷ Craig (n 89) 1085. Interestingly, the GC expressly highlights the link between the duty to give reasons and the right to effective judicial protection under Article 47 Charter. See *Sviluppo Globale GEIE v Commission*, T-183/10, EU:T:2012:534, para 40. See also A Sanchez Graells, ‘Duty to give reasons under EU procurement law and EU trademark law: is there a contradiction?’, *howtocrackanut*, 16 October 2012, available at <http://howtocrackanut.blogspot.co.uk/2012/10/duty-to-give-reasons-under-eu.html>, accessed 6 August 2015.

⁹⁸ Along these lines, the fact that a specific EU regime requires the public authority to follow a given procedure to channel its objectively good reasons or concerns will prevent it from acting outside of that procedure and, consequently, those will not be good reasons for the purposes of justifying the behaviour. To that effect, see *Synthon*, C-452/06, EU:C:2008:565, paras 41 to 43.

⁹⁹ In the area of standardisation and public procurement, see *Medipac - Kazantzidis*, C-6/05, EU:C:2007:337. The case is interesting because it limits the scope of ‘acceptable’ objectively good reasons that the public administration is allowed to adduce in justification of a behaviour that infringed secondary EU economic law.

enactment of the rule of EU economic law at stake. This will prevent the public administration from engaging in policy-related justifications that imply a second bite of the cherry where such trade-off or balancing exercise is already contained in the rule from which it deviated—eg, the public administration will not be able to provide a justification based on social considerations if the specific regulatory scheme has already incorporated a policy decision on the weight that can be given to those considerations.¹⁰⁰ More simply, the public administration will not be able to provide *any* objective reasons for its behaviour, but it will have to provide *adequate, reasonable and acceptable* reasons for there to be no consequences derived from the (unwanted) breach of EU economic law. As discussed below, it is submitted that this is fundamentally aligned with the doctrine of State liability.

B. Interplay with the Doctrine of State Liability for Infringement of EU Law

As is well known, under the doctrine of State liability for breach of EU law,¹⁰¹ one of the key conditions to grant compensation for damages caused by the illegal behaviour of a Member State or any of its emanations requires to justify that the breach of EU law is ‘sufficiently serious’.¹⁰² This was first enounced in *Brasserie du Pêcheur/Factortame III*,¹⁰³ and has then been progressively refined in the case law of the CJEU. The test was initially designed in the following terms:

finding that a breach of [Union] law is sufficiently serious is whether the Member State ... concerned manifestly and gravely disregarded the limits on its discretion. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national ... authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a [Union] institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to [Union] law.¹⁰⁴

In subsequent case law, the CJEU has stressed that the

condition requiring a sufficiently serious breach ... implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities.¹⁰⁵ [Additionally,] where at the time when it committed the infringement, the Member State in question ... had only considerably reduced, or even no, discretion, the mere infringement of [Union] law may be sufficient to establish the existence of a sufficiently serious breach.¹⁰⁶ [Consequently,] the Member State’s discretion, which is

¹⁰⁰ The issue is very similar to the assessment of non-economic justifications provided to derogate from EU competition law rules. For discussion and further references, see Sanchez Graells (n 33) 185-93.

¹⁰¹ For general discussion, see Craig and De Búrca (n 60) 257-61.

¹⁰² This requirement has been found to be the most difficult condition for a claimant to establish in a State liability case; see the T Lock, ‘Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich’ (2012) 49 (5) *Common Market Law Review* 1675, 1693.

¹⁰³ *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, EU:C:1996:79.

¹⁰⁴ Ibid, paras 55 and 56. See also *Haim*, C-424/97, EU:C:2000:357; and *Evans*, C-63/01, EU:C:2003:650.

¹⁰⁵ *Robins and Others*, C-278/05, EU:C:2007:56, para 70; *Synthon*, EU:C:2008:565, para 37; *Specht and Others*, C-501/12, EU:C:2014:2005, para 102.

¹⁰⁶ *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, EU:C:1996:205, para 28; *Dillenkofer and Others*, C-178/94, C-179/94 and C-188/94 to C-190/94,

broadly dependent on the degree of clarity and precision of the rule infringed, constitutes an important criterion in determining whether there has been a sufficiently serious breach of [Union] law.¹⁰⁷

At first reading, the inclusion of a subjective element (*‘whether the infringement ... was intentional or involuntary’*) amongst the conditions that can be taken into consideration to determine whether an infringement of EU law is ‘sufficiently serious’ seems to create a clash with the ‘objectified’ assessment advocated for in this paper. However, a closer look at the case law of the CJEU and its evolution shows that this element has not been given significant weight in the application of the State liability doctrine.¹⁰⁸ Given that State liability *‘cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of [Union] law’*,¹⁰⁹ there has been no relevant assessment of subjective elements in the behaviour of the public administration at the point of engaging State liability.¹¹⁰ The assessment of the sufficient seriousness of the breach of EU law by the Member State has been objectified and redirected towards an analysis of its respect to the limits of whatever levels of discretion it enjoyed under the relevant provisions. Where there is no discretion, the assessment of intention becomes totally irrelevant. Indeed, where the CJEU had the necessary information to be able to apply the test and determine whether the facts must be held to constitute a sufficiently serious breach of Union law in a case where competent national institution had no substantive choice, the CJEU did not assess whether the infringement was intentional or involuntary and simply relied on the objective situation created by the public administration concerned.¹¹¹ Where there is very limited discretion, the CJEU does not engage in any subjective assessment either and applies a test of strict liability.¹¹² Where there is broader discretion, the analysis revolves around the clarity and precision of the rule infringed, and the CJEU tends to restrict its analysis to an objective assessment of whether the interpretation followed by the Member State was reasonable or excusable, but it does not delve into subjective assessments.¹¹³

Moreover, the recent case law of the CJEU on liability derived from *judicial breaches of EU law* can provide some additional support to the claim that, generally, the test applicable under the second condition of the State liability doctrine does not give any significant weight to the subjective element requiring a determination of whether the infringement was intentional or involuntary—or, in other words, that the assessment needs to be reconfigured as an objective test. In that regard, even if it has shown some deference towards infringements of EU law by national courts, as compared to

EU:C:1996:375, para 25, and *Stockholm Lindöpark*, C-150/99, EU:C:2001:34, para 40. See also *Robins*, EU:C:2007:56, para 71; *Synthon*, EU:C:2008:565, para 38.

¹⁰⁷ *Synthon*, EU:C:2008:565, para 39. See, to that effect, *Robins*, EU:C:2007:56, paras 72 and 73.

¹⁰⁸ See T Tridimas, ‘Liability for Breach of Community Law: Growing Up and Mellowing Down?’ (2001) 38 (2) *Common Market Law Review* 301, 310. For discussion, see J Baquero Cruz, ‘*Francovich* and Imperfect Law’ in M Pólares Maduro and L Azoulay (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010) 418, 423 and ff.

¹⁰⁹ *Brasserie du Pêcheur and Factortame*, EU:C:1996:79, para 80. The situation is different when it comes to the liability of EU institutions, where the case law regarding fault requirements is much less clear. See P Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, *Modern Studies in European Law* (Hart, 2011) 47-51.

¹¹⁰ Indeed, there is a distinction between establishing liability independently of intention and then imposing a remedy that takes intention into account. This can be particularly relevant in relation to compensation claims.

¹¹¹ *Larsy*, C-118/00, EU:C:2001:368, paras 39 and ff.

¹¹² *Synthon*, EU:C:2008:565, paras 41 to 43.

¹¹³ *Robins*, EU:C:2007:56, paras 78 to 82. In less clear terms, *Specht*, EU:C:2014:2005, para 103.

infringements by the executive or the legislator,¹¹⁴ the CJEU still has rejected the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, and stressed that

although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of [Union] law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law.¹¹⁵

In view of all the above, it seems clear that the subjective element that can, in principle, be taken into consideration under the second condition for State liability not only has not played any significant role so far, but it cannot do so in the future because Member States cannot impose fault-based requirements stricter than a test of manifest infringement of the applicable law.¹¹⁶ It is submitted that this erodes, if it does not completely eliminate, any inconsistency with the ‘objectified’ assessment of subjective elements in EU economic law prohibitions advocated for in this paper.

VI. CONCLUSION

This paper has focussed on the difficulties that the assessment of the intention of the State and its emanations—for simplicity, the public administration—could create for the enforcement of EU economic law. To avoid those problems, it has submitted the thesis that the analysis of the subjective elements included in core prohibitions of EU economic law applicable to the public sector, or which require direct intervention by a public administration, needs to be ‘objectified’ and that the intention of the public administration needs to be assessed by a mix of presumptions and recourse to objective criteria that allow for a contextual analysis of the behaviour deemed to breach EU law.

In order to support this thesis, the paper has analysed the existing case law of the CJEU in the fields of public procurement and State aid as two areas of EU economic law subjected to interpretative and enforcement difficulties due to the introduction, sometimes veiled, of subjective elements in their main prohibitions. The analysis has shown how the CJEU has created a significant body of case law whereby the analysis of the intention of the public administration deemed to have breached EU public procurement or State aid rules is disregarded. The assessment rather concentrates on the factual context in which behaviour that created the effects proscribed by EU economic law took place, and whether it could be justified on the basis of objective good reasons or, at least, the public administration acted diligently and could legitimately hold that its behaviour was in compliance with the applicable rules. Generally, then, in these areas of EU economic law where the rules are addressed to the State and its emanations, the analysis of subjective elements is clearly ‘objectified’ by the CJEU.

The paper has also shown how this approach is in line with the benchmarks derived from other areas of EU economic law where the provisions are mainly directed to undertakings—ie private or public legal entities engaged in economic activity. In a similar fashion, in the areas of *antitrust*, non-discrimination law and the common agricultural policy, the CJEU has eroded or completely suppressed any assessment of the intent of the infringers of EU law, and substituted them with an assessment of the concurrence of any objective reasons that could justify their behaviour in a way that rationally explains

¹¹⁴ For discussion of the standard, see B Beutler, ‘State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?’ (2009) 46 (3) *Common Market Law Review* 773. Cf N Zingales, ‘Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?’ (2010) 11 (4) *German Law Journal* 419.

¹¹⁵ *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, para 44.

¹¹⁶ *Köbler*, C-224/01, EU:C:2003:513, paras 53 to 56.

the infringement and justifies it. In the case of *antitrust* rules, the CJEU has given particular weight to the fact that infringing undertakings generally know or ought to have known that their behaviour was bound to create the effects prohibited by Articles 101 and 102 TFEU. The paper has stressed that the same approach is clearly applicable to the public administration in view of its duty to act legally.

Indeed, the paper has emphasised that the public administration is bound to comply with EU law as a result of the duty of sincere cooperation in Article 4(3)II TEU and the specific requirements of the right to good administration in Article 41 Charter—so that there is no scope for it to validly deviate from such duty to *act legally*. Moreover, the duty to provide reasons that derives from the right to good administration is aimed at allowing a judicial review of the acts of the public administration where subjective elements play no role. The justifications or good reasons provided by the public administration are subjected to an objective analysis and a strict proportionality test, which are also compatible with the thesis advanced in the paper. Such compatibility has also been tested with the State liability doctrine. The paper has shown how, despite the old formulation of the criteria that can be taken into account to determine whether an infringement of EU law by a public administration is sufficiently serious and, consequently, gives rise to a claim in damages, the evolution of the case law of the CJEU excludes the possibility to impose fault-based requirements stricter than a test of manifest infringement of the applicable law. It has been submitted that this erodes, if it does not completely eliminate, any inconsistency with the ‘objectified’ assessment of subjective elements in EU economic law prohibitions advocated for in this paper.

In view of the discussion above, it seems clear that the introduction of subjective elements in core prohibitions of EU economic law applicable to the public administration is ineffectual and does not alter the analysis that derives from otherwise objective tests. The CJEU has repeatedly set aside, ignored or eroded the subjective elements created by the EU legislator or by older case law. In the end, the practical *leitmotif* of such interpretive strategy is that it is very difficult, if not completely impossible, to identify whose individual intention is determinative of the institutional behaviour under assessment. Designing, interpreting and enforcing rules addressed to legal entities in terms of the ‘intent’ of such bodies is legally impractical and creates legal uncertainty and risks of diminished effectiveness of EU economic law.

An understanding of these rules in terms of effects and an objective assessment of the circumstances in which they are produced, and the reasons therefor, is a superior regulatory device—and quite a natural one, as the organic evolution of the case law of the CJEU shows. Thus, from a normative point of view, it is preferable to advocate a construction of EU economic law around objective prohibitions. That would avoid the need to carry out complex analytical assessments in order to pin down the intent of the public administration—and, likewise, of private and public undertakings and non-natural persons—as well as convoluted reasoning aimed at overcoming the divide between the analysis of the observable (objective) circumstances in which breaches of EU law take place, and the second-guessing of the ultimate (subjective) reasons that triggered them. The thesis advocated in this paper, ie that the intention of the State and its emanations needs to be assessed in an objectified manner by a mix of presumptions and recourse to objective criteria that allow for a contextual analysis of the behaviour deemed to breach EU law, avoids both the need to engage in window dressing exercises through convoluted reasoning, and the risk of chasing ghosts at the risk of exonerating the public administration from liability when its intent to infringe EU economic law cannot be pinned down in the (possibly non-existent) paper trails leading to the infringement.